IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 543 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE D.K.TRIVEDI

and

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BHILUBHAI NANJIBHAI RATHWA

Versus

STATE OF GUJARAT

Appearance:

MR SP HASURKAR for Appellants

MR KG SHETH, APP for Respondent

CORAM : MR.JUSTICE D.K.TRIVEDI

and

MR.JUSTICE J.R.VORA

Date of decision: 17/01/2003

C.A.V. JUDGEMENT (Per : MR.JUSTICE J.R.VORA)

1. This appeal is preferred against the judgment and order dated 27.4.1998 of the learned Additional Sessions Judge, Godhra, convicting the present appellants under Section 302 read with 34 of the IPC. Appellant No.1 is father and appellant No.2 is his son.

2. The fact which led to the conviction of the present appellants reveals that PW-1 Shantaben, widow of Manjibhai Bhimabhai Rathwa, residing at village Gopipura, was staying with her deceased husband Manjibhai and was doing agricultural work. She had two sons, who were residing separately at village Baska. Fields of deceased Manjibhai and the appellants are situated adjoining and appellant No.1 Bhilubhai Nanjibhai Rathwa residing in a house situated in the field itself. Since the fields of the appellants and the complainant Shantaben had common boundary, there was dispute about the limits. There were some trees on the boundary between the fields of the parties and dispute had arisen that those trees belong to which party. Therefore, the appellant No.1 had arranged to survey his field through official surveyor to decide the boundary of the field so as to decide the trees standing on the boundary, fall in the boundary of whose field. In the meantime, one of such huge tree was cut down by appellant No.1 causing a ditch between the two fields. The incident in question occurred on 14.6.1997 at about 12.00 noon. This was the first incident when deceased Manjibhai was ploughing his field and PW-1 Shantaben was putting stones in the ditch created by felling of the tree. At that time, both the appellants came out of their house and started abusing PW-1 and said that why PW-1 was putting stones in the ditch which was in their boundary. It appears that in the same afternoon after two hours at about 2'O clock at noon, deceased Manjibhai went to the house of the appellants for scolding them for the abuses which they gave earlier at about 12'O clock to PW-1. It appears that some altercations had taken place. Both the appellants in excitement, quarrelled with deceased Manjibhai and appellant No.2 Galsingh Bhilubhai Rathwa caught hold of deceased Manjibhai and gave a blow of brick on the back of the head of deceased Manjibhai while appellant No.1 Bhilubhai Nanjibhai Rathwa gave a blow of stick on the back of the head of deceased Manjibhai. Deceased due to injuries had fallen down near the house of the appellants and was dead. PW-1 Shantaben therefore called some people from the village and her son who was staying at village Baska. Thereafter, at about 1730 hours on the same day, she went to Halol Police Station and gave a

complaint of the incident to PSI Raghunathsinh Motisinh Rathod who recorded the complaint and the same was registered as Halol Police Station Crime Register No. 212/97 by PW-5 Mohanbhai Raygibhai the then PSO of Halol Police Station. The fact further reveals that on the same day at 1745 hours PSO Mohanbhai Raygibhai, PW-5 also recorded a complaint of appellant No.1 Bhilubhai Nanjibhai Rathwa wherein appellant No.1 stated that at the time of incident PW-1 came to his house and started abusing. When he tried to persuade PW-1 Shantaben as well as deceased Manjibhai who accompanied Shantaben, on the contrary, deceased Manjibhai attempted to catch hold of him and in the meantime appellant No.2 Galsinh came down running and had fallen down on the heap of the bricks, due to which, he sustained injuries. He further stated that seeing this he was provoked and inflicted a blow of stick on the back of the head of the deceased. Appellant No.2 was sent to the hospital along with the yadi and he had some abrasion injuries below knee as per the medical certificate. PSI Rathod investigated the crime recorded as against the appellants. Dead body was sent for the postmortem, inquest panchnama before that was prepared, a panchnama of scene of offence was also prepared and ultimately a charge sheet against both the appellants came to be filed in the Court of Judicial Magistrate, First Class, Halol, who in turn committed the case to the Court of Sessions which was registered as Session Case No.161/1997.

3. Learned Addl. Sessions Judge framed charge against both the appellants under Section 302 read with Sec. 34 IPC on 29th of December, 1997.

4. Prosecution examined the sole eye witness complainant PW-1 Shantaben at Exh.9, Medical Officer PW-2 Dr. Kaushal Bhupendra Joshi, who conducted the postmortem of the dead body was examined at Exh.21, he also treated appellant No.2, Circle Inspector Mr. Sursing Terabhai Damor was examined at Exh.26 who prepared the sketch of scene of offence and produced it on record; PW-4 Vikrambhai Chandubhai Baria, panch of discovery panchnama has been examined at Exh.30; PSO Mohanbhai Raygibhai who registered the offence against the appellants and recorded the complaint of the appellant No.1 was examined as PW5 at Exh.32 and Investigating Officer - Raghunathsinh Motisinh Rathod, PW-6 was examined at Exh.34. Prosecution also produced documentary evidence i.e. Complaint - Exh.10, inquest panchnama - Exh.11, panchnama of scene of offence which is admitted by the parties and has been admitted to record at Exh.13, discovery panchnama by which appellant

No.1 discovered a stick is produced at Exh.31, postmortem note is at Exh.22, the sketch prepared by the official surveyor is produced at Exh.28, the complaint given by appellant No.1 before PW-5 Mohanbhai Raygibhai is at Exh.33, injury certificate of appellant No.1 is produced at Exh.25.

5. After hearing both the parties, the learned Addl. Sessions Judge came to the conclusion that both the appellants were liable to be convicted under Section 302 read with Section 34 of the IPC and, therefore, the learned Additional Sessions Judge vide his judgment and order dated 27.4.1998 sentenced both the appellants for life imprisonment and fine of Rs. 2,000/- to be paid by each of the appellants and in default six months simple imprisonment. Being aggrieved and dissatisfied by the above said judgment and order of conviction, the appellants have preferred this Appeal.

6. Learned Advocate for the appellants Mr. S.P. Hasurkar mainly contended that there is only one eye witness i.e. widow of the deceased whose evidence is required to be scrutinised carefully and there are contradictions in the evidence of PW-1 Shantaben. It has been argued that in the complaint Shantaben attributes one blow of stick and one blow of brick to each of the accused appellant Nos.1 and 2 while in her deposition she attributes two blows of stick and two blows of brick to each of the accused. The incident has occurred undoubtedly within the precinct of the house of the appellant No.1, the evidence of Shantaben, according to the learned Advocate, is far from natural evidence because she specifically states that she did not see any injury to appellant No.2. It was argued that in the postmortem note, the Doctor who conducted the postmortem found only one injury on dead body which is in contradiction of the evidence of Shantaben PW-1 and therefore the evidence of sole eye witness who is also related, cannot be accepted without corroboration. It was argued that Bhulabhai Dasrath a witness who was called at scene of offence and son of PW-1 Shantaben have not been examined by the prosecution to corroborate the evidence of Shantaben. It was vehemently argued that the panchnama of scene of offence at Exh.13 reveals the scene of offence as the western boundary of the field of the complainant while the dead body was found which is near the house of the appellant No.1. The prosecution has failed to reconcile this contradiction. Ultimately, it was argued that according to the medical evidence, stone injuries by appellant No.2 is not proved and appellant No.1 is attributed with single blow of stick and for that

also the evidence of PW-1 Shantaben falls short. It was argued that at the most since the injuries have not been proved, appellant No.2 is required to be acquitted by giving reasonable benefit of doubt and appellant No.1 cannot be convicted for the offence under Section 302 of the IPC. It was argued that it is an admitted fact that the incident occurred near the house of the appellants and therefore the defence as has been disclosed in the further statement by the appellant is more probable which is corroborated by the complaint given by appellant No.1 which is at Exh.33.

7. On the other hand, learned APP Mr. K.G. Sheth has vehemently supported the decision of the learned Trial Judge. He argued that the eye witness PW-1 Shantaben is fully supported by the medical evidence which discloses that the deceased had injuries on the back of the head of the deceased resulting in skull fracture and ultimately resulting in death. It was argued that according to the medical opinion, this was sufficient injury in ordinary course of nature to cause death. Our attention was drawn to the complaint filed by appellant No.1 which is at Exh.33 and it was argued that in the said complaint appellant No.1 has also admitted the offence. It was argued that the discovery of stick is proved by the discovery panchnama which is at Exh.31. The Panchnama at Exh.31 is fully supported by PW-4 Vikrambhai Chandubhai, examined at Exh.30. It was urged that the appeal be dismissed being without any substance.

8. Having regard to the arguments advanced and contention raised, we have carefully gone through the evidence and the record of the case. We have undertaken the threadbare scrutiny of the evidence on the record. The death of the deceased Manjibhai is undoubtedly a homicidal death. Dr.Kaushal Bhupendra Joshi, was examined at Exh.21, who conducted the postmortem of the deceased. According to him, the dead body had an injury on the back side of skull and that was CLW 3" x 2" causing fracture and consequential brain haemorrhage. The cause of death, according to PW-2 was brain haemorrhage and respiratory failure. According to Doctor, he prepared postmortem note which is at Exh.22. The Doctor has opined that this injury was possible if at the same place of body i.e. on backside of the head, a stick blow as well as a brick blow are inflicted. According to this witness the injuries were sufficient in the ordinary course of nature to cause death. The injury was anti mortem. He has been sufficiently cross-examined but the evidence of the Doctor could not be shaken by the defence. In cross-examination though PW-2 has stated

that the injuries, which the deceased had, cannot be inflicted by stone shown to him from the muddamal articles but the same was possible by stick blow and by the stick which was in muddamal article. We have no hesitation to accept the evidence of PW-2 to the extent to prove that the death of the deceased was homicidal one and injury which the deceased had on the backside of his head, caused his death. We also rely on the Doctor PW-2 to prove that the injury which sustained by the deceased can be caused by the stick blow as well as by the brick blow.

9. The sole eye witness Shantaben has been examined by the prosecution at Exh.9 as PW-1. From her evidence it is amply clear that the prosecution story reveals in two parts. The first part the prosecution story is in respect of the incident which took place at 12'O clock at noon on 14.6.1997. According to the deposition of Shantaben she was putting stones in the ditch caused by felling of the tree on the western boundary of her field and both the appellants started abusing her after coming out of their house and from their field. The deceased was ploughing the field at that time. It is further clearly revealed from the evidence of PW-1 that thereafter at 2'O clock on the same day deceased went to the house of appellant No.1 to scold him for the abuses which both the accused appellant delivered to PW-1. According to her evidence, deceased Manjibhai requested both the appellants not to abuse them. In the meantime, accused No.2 came and gave two blows of brick on the back side of the head of the deceased and accused No.1 appellant No.1 Bhilubhai Nanjibhai gave two blows of stick on the back side of the head of the deceased. A stick blow was also given by accused No.1 on the back of the deceased. Accused No.2 tried to escape from the scene of offence and in this process he had fallen on the heap of the bricks situated near the house of the appellants. In her cross-examination, suggestions are put to her that after the first incident, deceased Manjibhai attended a function in the village and had consumed liquor and therefore in intoxicated state deceased rushed to the house of the appellants and picked quarrel with the appellants. It was suggested that accused No.2 Galsingh was injured by the deceased through brick blows below the knee. It was also suggested that accused No.2 had fallen down and the deceased had mounted him and so accused No.1 gave a stick blow on the back side of the head of the deceased. The witness PW-1 has categorically denied these suggestions put to her in chief-examination. True it is that when there is a sole eye witness, who is related one, the evidence must be

scrutinised very carefully. At the same time it is not a rule that in all cases the sole eye witness who is related one, must be corroborated by other evidence. We have to examine and to scrutinize the evidence of PW-1 on day-to-day reality of life. It must be borne in mind that PW-1 is a rustic villager. Her evidence was recorded after about 7 to 8 months of the incident. In ordinary course, there would be some variations in the version of such eye witness. What is material is to examine whether the contradiction alleged contaminate the core of the prosecution case. Further the witness may exaggerate and embroider the facts because the same is the natural human tendency. While scrutinizing the evidence of such witnesses, it is the bounden duty of the Court to find out the truth and discard the minor variations. We, as such after scrutinising the evidence of PW-1, do not at all find any infirmity on account of contradictions or omissions in her evidence. The presence of this witness at the scene of offence is natural and cannot be denied. It is not the material contradiction that in the complaint she attributed one blow each of stick and brick and in the deposition she attributed two blows of stick and brick to each of the accused. This is not affecting the core of the prosecution case. We do not also come to the conclusion that there is a conflict between the medical evidence and the evidence of the eye witness on this account. It may be an exaggeration by PW-1 to depose two blows instead of one blow. We cannot disbelieve this witness on that count nor the prosecution case can be thrown out only because the medical expert or inquest panchas did not record more than one blow or any blow on the back of the deceased as deposed by PW-1. So, we cannot accept the contention on behalf of the appellants that the evidence of PW-1 is not trustworthy or creditworthy. Al beit, the manner in which the prosecution case has been revealed by the witnesses and the defence of the accused is considered, then the question for this court for contradiction would be as to which offence the appellants can be held guilty.

10. Prosecution witness No.4 Exh.30 Vikrambhai Chandubhai has supported the panchnama of discovery of the stick at the instance of the accused No.1. The panchnama of discovery is at Exh.31. Though this witness is thoroughly cross-examined but there is no reason to disbelieve the discovery of the stick from the house of the appellant No.1. It is pertinent to note here that the discovery of the stick at the instance of the accused is from the corner of the room of the house belonged to appellant No.1. In the circumstances of this case, we

cannot brand this to be a discovery from the open place. Discovery of the stick therefore is proved at the instance of the appellant No.1 which is recovered from the corner of the room of the house belonged to the appellant No.1 and the eye witness had identified this stick.

11. It was argued on behalf of the defence that the scene of offence has been shown by PW-1 eye witness Shantaben and a panchnama to that effect at Exh.13. This panchnama of scene of offence has been admitted by the defence and has to be considered in the evidence. True it is that Shantaben has also shown the place of incident at western boundary of their field and further she has shown the place where the dead body of Manjibhai was found. This situation in the evidence in any manner would not help the defence. When we read this panchnama along with the deposition of Shantaben PW-1 it is amply clear that the prosecution reveals the story in two parts. The first incident which took place at about 12'O clock in the day time near the western boundary of the field of the deceased and the second incident took place near the house of the appellant at about 2'O clock. In panchnama PW-1 Shantaben has shown these two places firstly when the incident took place at 12'O clock and secondly from where the dead body of the Manjibhai was found. When we appreciate the evidence of PW-1 along with the panchnama of scene of offence at Exh.13, it becomes transparent that the alleged incident by which deceased Manjibhai lost his life occurred at 2'O clock near the house of the appellants. Finding of stone near the western boundary of the field of the deceased by the police or some marks of scuffle there, would not render the prosecution case unworthy of credit. The defects of the Investigating Agency cannot and must not help the defence when otherwise the case is proved by other evidence. For what is stated above we cannot accept that since the investigating agency discovered stone and scuffle marks at western boundary of the field of deceased, there was contradiction in the scene of offence and prosecution case becomes weak. Such recovery is random act of investigating agency and moreover not at the instance of PW-1 Shantaben. We can safely discard such recovery from consideration. There may be stones and scuffle marks at that place and mere recovery of such stones and scuffle marks cannot lead to believe that the incident had not occurred near the house of the appellants and at the western boundary of the field of the deceased so as to render the prosecution case seriously defective. This cannot be branded as contradictions as to the scene of offence entitling the

appellants for benefit of doubt and acquittal. This is more so because the muddamal article - stones recovered from the western boundary of the field of the deceased was shown to PW-1 during her deposition and she denied that those were the same stones by which appellant No.2 inflicted injury to the deceased. On this count, there is no contradiction in the prosecution case and we believe that the first incident occurred at 12'O clock near the western boundary on the field of deceased and the next incident occurred at about 2'O clock on the same day near the house of the appellants and there the deceased sustained serious injury at the hands of the appellants which caused his death.

12. PW-5 Mohanbhai Raygibhai is examined at Exh. 32 who has registered the complaint of PW-1 and also recorded the complaint of accused No.1 which is at Exh.33. PW-6 is the Investigating Officer examined at Exh.34.

13. Having scrutinised the evidence as said above, we come to the conclusion that the story of prosecution is creditworthy and inspires confidence. This again lead us to the question that in the circumstances revealed by the evidence whether the appellants are guilty of offence punishable under Section 302 of the IPC read with Section 34. The crucial aspect of the prosecution story is whether each of the appellants is proved to have the intention to cause death of the deceased or had intention to cause such bodily injury to cause death of the deceased. In this exercise, the defence version as well as the circumstances leading to the incident and surrounding the same must be taken into account. Though the complaint filed by appellant No.1 which is at Exh.33 cannot be taken into consideration so far as his admitting of the guilt is concerned, but the fact which remains proved is, the offence committed was within the precinct of the appellants residence. It is also to be noted that after the first incident occurred at 12'O clock, the deceased along with PW-1 went to the residence of the appellants to scold them for the abuses they uttered earlier. The medical evidence also must be taken into account. The crucial aspect of the medical evidence reveals that neither the sole stick blow nor the sole brick blow could cause injury which deceased had. The deceased had only one injury in the size of 3" x 2" causing skull fracture damaging the brain. The Doctor opined that the cumulative effect of the stick blow as well as of the brick blow at the same place of body could cause the injury which the deceased had. Meaning thereby that either the stick blow or the brick blow individually

was not capable of causing the injury that the deceased had and was in the opinion of the medical expert was sufficient in the ordinary course of nature to cause death. The location of the scene of offence as well as the fact that the deceased Manjibhai had been to the appellants house for scolding them for uttering abuses, and the medical evidence are appreciated in juxtaposition, we are led to believe that this is not a case wherein any of the appellants can be attributed to the intention of causing death of Manjibhai nor with the intention to cause such injury as to cause death of deceased Manjibhai. At the same time, other circumstances of the case are also required to be considered that the first incident had occurred at 12'O clock and according to the deposition of PW-1 Shantaben both the accused uttered abuses and this altercation never had grown to the extent of any serious consequences. If the appellants had the intention to cause death, there was ample opportunity at that time when both the deceased as well as PW-1 were present in the field to cause death of deceased Manjibhai. In the latter incident also when the defence in the prosecution case is appreciated and scrutinised on the touchstone of probability, then it comes out that some altercation between the parties must have been taken place and without any premeditation and intention since the deceased had been to the appellants for scolding them, in provocation each of the accused inflicted a blow of stick and brick respectively. Except one injury on the back of the head of the deceased which is cumulative effect of the individual act of the each of the appellants, none of the appellants have acted in cruel manner and inflicted more injuries. Therefore, having put the circumstances on the anvil of the probability it is emerging from the circumstances and the evidence disclosed by the prosecution that the appellants cannot be attributed to the intention either to cause death or to cause such body injury to cause death of the deceased Manjibhai. Further, the circumstances warrant that the case is covered by Exception Nos.1 and 4 of Section 299 of the IPC. In all probability, the incident has occurred due to provocation because deceased Manjibhai went to the appellant's house to scold them for uttering the abuses. This is the inescapable probability resulting from the evidence of the prosecution case that the incident which is revealed by evidence is without any premeditation so far as the appellants are concerned. If we believe the prosecution story that the appellant No.1 inflicted one blow of stick and if we scrutinize the defence though not wholly believable, the probable manner in which the incident occurred is the deceased Manjibhai attempted to

scold both the accused, there was some altercations, due to which appellant No.1 inflicted stick blow and appellant No.2 inflicted brick blow and also received minor abrasion injuries near below his knee as proved by the Medical certificate. From the above we come to the conclusion that though the prosecution has proved the case to abovesaid extent but failed to prove the mental state of required intention of each of the appellants so as to convit anyone of them under Section 302.

14. In this view of the matter, the learned Trial Judge erred in convicting the appellants for the charges under Section 302 of the IPC. The fact clearly reveals that the act of appellants were without any premeditation and intention and therefore the act must follow within the ambit of Part-II of Section 304 of the IPC. Though the appellants might have the knowledge that the injuries caused to the deceased may cause death but the required intention to cause such bodily injury could not be established by the prosecution or what is revealed by the prosecution case, the premeditation part in the act of the appellants is absent. With the above, we modify the judgment and order under appeal to the extent that the conclusion of the Trial Judge holding both the appellants guilty for the offence under Section 302 of the IPC and sentencing them for the life imprisonment and fine is set aside. On the above mentioned scrutiny of the evidence we conclude that both the appellants individually is guilty of the offence punishable under Section 304 Part-II of the IPC.

15. Now so far as the sentence for above said offence of Section 304 Part-II of IPC is concerned, we have gone through the record and have taken into consideration the explanation offered by the accused before the Trial Court and we have heard the learned Advocate for the appellants. In the facts and circumstances of the case, to meet the ends of justice, each of the accused is sentenced to five years rigorous imprisonment and fine of Rs.1,000/- in default to undergo simple imprisonment of 15 days for the offence punishable under Section 304 Part-II and each of the accused shall be entitled to benefit of set off of the period for which they were under custody during trial.

16. Appellant No.1 Bhilubhai Nanjibhai Rathwa has been released by this Court on bail during the pendency of this appeal. He is directed to surrender before the Jail Authority within 15 days from today. If he has served the sentence as aforesaid, then it is directed that he be released immediately if he is not required for

any other purpose. Appellant No.2 - Galsingh Bhilubhai Rathwa also be released after he has been served with the sentence as aforesaid if he is not required for any other purpose.

17. Appeal is allowed to the above said extent. The order passed by the learned Trial Judge in respect of muddamal is not disturbed.

(D.K. Trivedi, J.)

(J.R. Vora, J.)

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